

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN:

GRASSY NARROWS FIRST NATION

Applicant

and

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
as represented by the DIRECTOR OF EXPLORATION,
MINISTRY OF NORTHERN DEVELOPMENT, MINES,
NATURAL RESOURCES AND FORESTRY**

Respondent

**NOTICE OF APPLICATION TO DIVISIONAL COURT
FOR JUDICIAL REVIEW**

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing (*choose one of the following*)

- In person
- By telephone conference
- By video conference

at the following location:

Osgoode Hall, 130 Queen Street West, Toronto, ON M5H 2N5

on a day to be set by the registrar.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS APPLICATION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for hearing or terminated by any means within five years after the notice of application was filed with the court, unless otherwise ordered by the court.

Date November 15, 2021 Issued by 

Registrar
Divisional Court
Superior Court of Justice
Osgoode Hall, 130 Queen Street West
Toronto, Ontario M5H 2N5

TO: The Director of Exploration
Ministry of Northern Development,
Mines, Natural Resources and Forestry
c/o Legal Services Branch
Ministry of Northern Development,
Mines, Natural Resources and Forestry
Suite 1600, 700 Bay Street
Toronto, Ontario M5G 1Z6
cloc.reception@ontario.ca

AND TO: Attorney General of Ontario
Crown Law Office-Civil
8th Floor, 720 Bay Street
Toronto, Ontario M7A 2S9
cloc.reception@ontario.ca

APPLICATION

Introduction

Her Majesty the Queen in Right of Ontario (“Ontario”) failed to consult Asubpeeschoseewagong Netum Anishinabek (“Grassy Narrows First Nation” or “Grassy Narrows”) on nine mining Exploration Permits (“Permits”) in the Traditional Territory (“Territory”) of Grassy Narrows issued by the Director of Exploration, Ministry of Northern Development, Mines, Natural Resources and Forestry. The failure to consult is inconsistent with the honour of the Crown and a breach of Ontario’s constitutional duties to Grassy Narrows under s 35 of the *Constitution Act, 1982*; Ontario’s statutory and regulatory obligations under the *Mining Act*, RSO, c M 14 and its Regulation 308/12 on Exploration Plans and Permits; and Grassy Narrows’ Land Declaration, a Grassy Narrows law of inherent right with respect to the Territory. Accordingly, the Permits are unlawful and should be quashed.

Grassy Narrows people exercise established Treaty 3 rights, Aboriginal rights, and inherent Indigenous rights on their Territory. There is a geographic area within the Territory (the “subject area”), set out in Appendix “A” herein, which is a part of the area in which Grassy Narrows people hold interests, exercise rights, and carry out land-based practices. Ontario has actual and constructive knowledge of the subject area through myriad interactions and communications over time between Grassy Narrows and Ontario including judicial proceedings, negotiations, dialogue processes, and correspondences. Although the applications for the Permits proposed early exploration mining activities on the subject area that have the potential to adversely impact Grassy Narrows’ rights, Ontario did not consult Grassy Narrows on the Permits before proceeding to issue them. Ontario’s conduct occurred during a timeframe when Grassy Narrows was actively

corresponding with Ontario regarding the subject area and making repeated requests of Ontario to, *inter alia*, form a table to resolve land use issues in the subject area, protect and conserve the subject area and expressly prohibit mining and mining exploration as a permissible activity in the subject area.

The direct and cumulative impacts of industrial activity imposed on Grassy Narrows over time, including the damming of the English River, mercury contamination resulting from upstream pulp and paper manufacturing, clearcut logging, and mining exploration, have been highly detrimental to the environment within the subject area and the Territory in extent, and to Grassy Narrows people, their way of life and ability to exercise their inherent and constitutionally protected rights. Grassy Narrows cannot endure any further imposed industry in the subject area as this will further impact Grassy Narrows people's health and rights, and the environment in which Grassy Narrows people practice their way of life. Given the established Treaty 3 rights at stake, the history of direct and cumulative impacts and the need to respect Grassy Narrows' Land Declaration, Ontario was obliged to consult Grassy Narrows at the high end of the consultation spectrum and obtain Grassy Narrows' consent to the Permits.

Relief Requested

1. The Applicant makes application for:
 - (a) a declaration that Ontario breached the honour of the Crown and the duty to consult and obtain consent from Grassy Narrows with respect to the issuance of the Permits;

- (b) an order in the nature of certiorari quashing the Permits issued by the Director of Exploration that allow for early exploration mining activities in the subject area of Grassy Narrows' Territory:
- (i) PR-18-000162;
 - (ii) PR-19-000061;
 - (iii) PR-19-000232;
 - (iv) PR-19-000302;
 - (v) PR-19-000322;
 - (vi) PR-20-000040;
 - (vii) PR-20-000102;
 - (viii) PR-20-000219; and
 - (ix) PR-20-000357.
- (c) until such time as this Application is heard and determined on its merits, an interim or interlocutory order, pursuant to section 6 of the *Judicial Review Procedure Act*, that Ontario must provide Grassy Narrows ninety (90) days notice before any further work under the Permits is carried out in the subject area of the Territory;
- (d) a declaration that Ontario must carry out the duty to consult in good faith and obtain Grassy Narrows' consent with respect to any mining activities proposed in Grassy Narrows' subject area, including the future consideration by Ontario of

applications, if any, for re-issuance or renewal of the Permits if they are quashed by this Court;

- (e) a declaration that as part of carrying out the duty to consult on exploration permits, including applications, if any, for re-issuance or renewal of the Permits if they are quashed by this Court, Ontario must provide Grassy Narrows with capacity funding sufficient to make consultations well informed and meaningful;
- (f) an order in the nature of prohibition that prevents Ontario from issuing any further mining claims or exploration permits in the subject area of the Territory until such time as the conflict between Ontario law and Grassy Narrows law with respect to land use in the subject area has been resolved to the mutual satisfaction of both parties;
- (g) an order in the nature of prohibition that prevents Ontario from issuing any mining-related authorizations within the subject area of the Territory until Grassy Narrows has recovered from the mercury contamination crisis and COVID-19 pandemic as Grassy Narrows cannot engage in meaningful consultation during these ongoing and overlapping crises;
- (h) a declaration that Ontario cannot consider mining activities in the subject area of the Territory, including issuing exploration permits, until the parties negotiate and reach agreement on timely enforceable mechanisms to assess and manage the cumulative impacts of mining, logging, hydro-electricity projects, other industrial development, mercury contamination, and governmental policies or programs that may infringe Grassy Narrows' treaty rights;

- (i) an order, if necessary, extending the time to bring this application for judicial review pursuant to ss 5(2) of the *Judicial Review Procedure Act*;
- (j) an order granting the Applicant its costs in this Application;
- (k) such further and other relief as counsel may advise and this Honourable Court may permit.

2. The grounds for the application are:

The Parties

- (a) The Applicant, Grassy Narrows, is an Anishinaabe First Nation located in northwestern Ontario. Grassy Narrows is the collective rights holder of an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982*, an Indigenous people within the meaning of the *United Nations Declaration of the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/61/49 (2007), and the Asubpeeschoseewagong Anishinabek under the *Asubpeeschoseewagong Anishinabek Aaki Declaration* (Grassy Narrows Land Declaration or the “Land Declaration”). Grassy Narrows has the status of a “band” within the meaning of the *Indian Act*, RSC, 1985, c. I-5.
- (b) The Respondent, Ontario, is the representative of the Crown in right of Ontario designated by section 14 of the *Crown Liability and Proceedings Act*, 2019, SO 2019, c 7, Sch 17.

- (c) The Ontario Ministry of Northern Development, Mines, Natural Resources and Forestry (formerly the Ministry of Energy, Northern Development and Mines) (the “Ministry”) is responsible for the administration of the *Mining Act*, RSO 1990, c M. 14 and its regulations. The Director of Exploration (“Director”) within the Ministry is an Ontario public servant responsible for considering and issuing exploration permits under section 78.3 of the Act. The Director was Ontario’s administrative decision-maker who exercised a statutory power of decision under the *Mining Act* to issue the Permits.

Grassy Narrows Treaty 3 Rights and Inherent Indigenous Rights

- (d) Grassy Narrows people are Anishinaabe people. Many Grassy Narrows people engage in Anishinaabe practices on the Territory, understand and/or speak their indigenous language of Anishinaabemowin, and believe ardently in protecting the land and water of their Territory that gives them life.
- (e) Grassy Narrows people hunt, trap, fish, and practice their Anishinaabe way of life to provide for themselves, their families and community. These resource-based practices have always been, as they continue to be, essential to Grassy Narrows people’s sense of self and identity, culture, wellbeing, health, and economy.
- (f) In 1873, ancestors of Grassy Narrows people adhered to Treaty 3. Grassy Narrows signatories of Treaty 3 (the “signatories”) were focused on preserving their way of life and ensuring that any treaty arrangement would protect Grassy Narrows people’s ability to live on the land as they had before, fishing, hunting, trapping, and engaging in other land-based practices. The signatories were only prepared to

treaty if it would not interfere with the Grassy Narrows way of life; they were in no rush to make a deal and were unwilling to enter a treaty that would compromise or undermine their practices.

- (g) Treaty 3 specifically guarantees Grassy Narrows' rights to hunt and fish. The signatories were assured by the Treaty Commissioner that the treaty promises would protect their land-based practices in perpetuity which would allow Grassy Narrows people to hunt and fish in the Territory as they had before.
- (h) Ontario has real knowledge of Grassy Narrows' Treaty 3 rights and interests.
- (i) Grassy Narrows people engage in myriad practices in the Territory that are also integral to Grassy Narrows' distinctive culture. Grassy Narrows practices continue today, such as ceremony, medicine and wild rice harvesting, and the observance of sacred landscapes and burial grounds.
- (j) Grassy Narrows exercises its inherent right to self-determination and law-making powers that are ancillary to self-determination. Such inherent rights are recognized in international instruments including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which Canada fully supports without qualification. Canada has passed the UNDRIP Act, SC 2021, c 14 which commits to taking all measures necessary to ensure the laws of Canada are consistent with the UNDRIP and that there is an action plan implemented to achieve the objectives of the UNDRIP.

- (k) Grassy Narrows enacted the Land Declaration in October 2018. The Land Declaration is a sacred Grassy Narrows law of inherent right that sets out the will of Grassy Narrows people with respect to the Territory. The Land Declaration declares the Territory an Indigenous Sovereignty and Protected Area (also referred to as an Indigenous Protected and Conserved Area or “IPCA”); and bans certain land uses on their Territory, including a ban on mineral staking and mining as well as mining activities that do not have Grassy Narrows’ consent such as exploration.

Grassy Narrows’ Territory

- (l) Grassy Narrows has occupied its Territory since time immemorial. Anishinaabe people were living on the Territory long before European settlers arrived. Grassy Narrows people’s knowledge of their Territory derives from oral history and past and active land use.
- (m) The Territory is in northwestern Ontario in the Boreal Shield ecoregion in a mixed forest transition zone from the Great Lakes St Lawrence Forest to the Boreal Forest. The Whiskey Jack Forest is the English name of the forest that covers a large portion of the Territory; the English-Wabigoon River System is a central waterway in the Territory. The land and waterways of the Territory sustain Grassy Narrows people’s way of life.
- (n) Grassy Narrows’ Territory is the foundation of who Grassy Narrows people are as Anishinaabe people. Grassy Narrows people follow the teachings of their Elders to be responsible for their Territory and to *Manaachitootaa Aki*, to protect the land.

- (o) The subject area is a large area of the Territory in which Grassy Narrows people have been carrying out their land-based practices from time immemorial; it is the interim geographical area, at minimum, that Grassy Narrows must be consulted on under Ontario's law when Ontario contemplates any activity on the Territory that may adversely affect the exercise of Grassy Narrows people's rights.
- (p) Grassy Narrows must be consulted on activities that may have off-site impacts on this geographic area such as downstream, downwind, or migratory species impacts. Grassy Narrows continues to document the full extent of its Territory and the "subject area" is without prejudice to the determination of the full geographical extent of Grassy Narrows' Territory.

Resource Extraction on the Territory

- (q) In the 1950s, Ontario authorized the construction of hydro dams on the English River in the Territory both upstream and downstream of Grassy Narrows' reserve. The dams altered water levels in an unnatural way and impacted Grassy Narrows' way of life in myriad ways including loss of wild rice crops, fur bearing animals, and important cultural knowledge such as how to cross the river ice safely.
- (r) Starting in 1962, a chlor-alkali plant in Dryden, Ontario, began discharging mercury into the English-Wabigoon River system. Approximately 9,000 kilograms of mercury were discharged into the river system in the absence of, or notwithstanding any, statutory or regulatory action to bar such pollution. The river system flows through the Territory and is a lifeline for Grassy Narrows people.

- (s) The impacts of the mercury contamination have been devastating on the people of Grassy Narrows and the environment. The presence of mercury led to the methyl mercury contamination of the fish and Grassy Narrows people; Grassy Narrows people being subject to multiple debilitating health symptoms and premature death; the shutdown of the local commercial fishery; the collapse of Grassy Narrows' economy; social disruption; and extensive harm to the Grassy Narrows way of life.
- (t) In the 1970s and 1980s, Grassy Narrows called on Ontario to respond to the mercury crisis by taking concrete action, including by agreeing that Grassy Narrows would control the Territory which would best position Grassy Narrows to restore their way of life and to protect Grassy Narrows people from further harm and the land and water on which Grassy Narrows people rely. Rather than respecting Grassy Narrows' wishes for the Territory, Ontario authorized extensive clear-cut logging in the Territory which likely released new, or additional, sources of mercury into the watershed, and increased methyl mercury contamination of fish, and consequential harm, or further harm to the health and wellbeing of Grassy Narrows people. This prolonged and exacerbated the mercury crisis.
- (u) Clear-cut logging further undermined the meaningful exercise of Grassy Narrows people's rights, as hunting and trapping grounds were decimated, burial grounds logged over, pine marten reserves depleted, and local moose and caribou populations left the Territory.
- (v) In 2007, Grassy Narrows people declared a moratorium on industrial activity in the Territory until such time as the Crown regained its honour and obtained Grassy

Narrows' consent. In 2015, in a community referendum conducted with support from Ontario, Grassy Narrows people voted strongly against industrial logging in the Territory.

- (w) Ontario has further allowed for mining activities to occur in the Territory, and in recent years has allowed an unplanned, unmitigated, and unconscionable staking boom in the subject area throughout Grassy Narrows' last remaining fruitful moose hunting grounds. Grassy Narrows estimates that there are approximately 4,000 mineral claims in the subject area. The vast majority of these claims are new, with an explosion in claims as of 2018, coinciding with Ontario's introduction of online staking, leading to a substantial increase in the number of claims.
- (x) The direct and cumulative impacts of industrial activity imposed on Grassy Narrows, including hydro damming, mercury contamination and resource extraction, have been highly detrimental to Grassy Narrows people and their way of life. Resource extraction and related activities in or near the subject area have had highly detrimental impacts on Grassy Narrows' people's health and ability to exercise their rights. Grassy Narrows cannot endure any further imposed industry in the subject area nor any further impact on the meaningful exercise of their rights, nor on the environment that supports their health and the exercise of their rights.

Ontario's *Mining Act* and the Duty to Consult

- (y) Ontario provides for the duty to consult in the *Mining Act* (the "Act") and Ontario Regulation 308/12 on Exploration Plans and Exploration Permits (the "Regulation"). The Act and Regulation set out how Ontario considers its duty to

consult should be met; the common law sets out requirements for when the duty to consult is owed and what its content must be for Ontario to meet its section 35 constitutional obligations under the *Constitution Act, 1982*, including the need for Ontario to accommodate, justify any infringements, or obtain consent.

- (z) The Act and Regulation recognize that certain early exploration mining activities require permits and trigger the duty to consult, and therefore prescribe a regime in which Ontario and proponents can take steps to seek to discharge Ontario's duty to consult.
- (aa) Early exploration mining activities prescribed at Schedule 3 of the Regulation are activities which require an exploration permit pursuant to section 78.3 of the Act.
- (bb) Sections 11 to 20 of the Regulation pertain to exploration permits. Upon receipt of an application for an exploration permit, the Director is obliged to take steps to discharge the duty to consult, including the most basic steps of identifying Aboriginal communities to notify; providing notice to those communities by sending a copy of the application; and accepting written comments from the communities (ss 14(1) and (2)). Before deciding whether to issue an exploration permit, the Director can direct proponents to consult Aboriginal communities and to file a consultation report regarding any consultation process that occurred (ss 14(2) and (3)). The Director must consider information provided by Aboriginal communities when deciding whether to issue an exploration permit.
- (cc) The Director is obliged to decide whether to issue an exploration permit and, if so, on what terms and conditions, within fifty (50) days of circulating the application

to Aboriginal communities. Irrespective of this prescribed timeline, the Director must be satisfied that the duty to consult has been carried out before deciding whether to issue an exploration permit (ss 15(1)). Under the Regulation, First Nations have a right to request an issue resolution process before a permit is issued.

Key Interactions and Communications Over Time Regarding the Territory and Subject Area

- (dd) In the 1980s a map was made by the Ontario Ministry of Natural Resources to identify a Grassy Narrows Traditional Land Use Area (the “1980s TLUA Map”) for the purposes of mediated negotiations between Grassy Narrows and Ontario with respect to a section of the Territory required by Grassy Narrows to restore its economic self-sufficiency. The map used straight lines which is not reflective of the boundaries of the Territory and does not include the northern portion of the Territory.
- (ee) In 1999 Grassy Narrows brought a legal action against Ontario’s Minister of Natural Resources which involved an area of the Territory that is within the Whiskey Jack Forest north of the English River; a part of this area extends beyond the 1980s TLUA Map.
- (ff) Between 2008 and 2017 Grassy Narrows and Ontario engaged in discussions on forestry under the Grassy Narrows Ontario Process Agreement (the “Process Agreement”). As part of that process Grassy Narrows submitted a map of the “Grassy Narrows area of interest for forestry” which included the entire subject area, including the part of the subject area that is outside the 1980s TLUA Map

boundaries. Ontario made a number of short-term deferrals of clearcut logging operations during this time period based on this area.

- (gg) In 2011, after the release of the trial decision in *Grassy Narrows v Ontario (Natural Resources)* (2011 ONSC 4801), the litigation that Grassy Narrows commenced in 1999, Justice Feldman issued a Stay Order. Following the Stay Order, Ontario withdrew a large part of the subject area from staking. The area withdrawn was the part of the subject area that is north of the English River, including the part that is outside the boundaries of the 1980s TLUA Map; the area withdrawn included the part of the subject area that is now overlapped by the Permits.
- (hh) The trial judge's findings of fact that the area in question was Grassy Narrows' Territory were not overturned on appeal.
- (ii) As of 2011, at the latest, Ontario had real knowledge that the Whiskey Jack Forest north of the English River was a part of Grassy Narrows' Territory.
- (jj) Around this time, Ontario was commencing planning for the 2012-2022 Forest Management Plan ("FMP") of the Whiskey Jack Forest. Pursuant to the *Crown Forest Sustainability Act, 1994*, SO 1994, c 25, an FMP is prepared for each Forest Management Unit (FMU) in the province. Under Ontario's forest management and planning scheme, the Whiskey Jack Forest is a FMU that is planned for on an approximate ten-year cycle.
- (kk) In January 2014, pursuant to the *Environmental Assessment Act*, RSO 1990, c. E.18, Grassy Narrows requested Ontario to order that an Individual Environmental

Assessment be conducted (the “IEA Request”) to identify, evaluate, and mitigate potential impacts on the environment, fisheries, and human health caused by additional mercury contamination arising from clear-cut logging authorized under the 2012-2022 FMP for the Whiskey Jack Forest. Ontario denied the IEA Request.

- (ll) The Grassy Narrows “Interim Area of Interest” which was identified for the IEA Request covered a large area of the Territory (“IEA Request Area”) that is identical to the subject area and includes the portion of the Whiskey Jack Forest north of the English River. The IEA Request Area, synonymous with the subject area, was illustrated in a map which Ontario has had in its possession since 2014.
- (mm) As of 2014, at the latest, Ontario had real knowledge that the IEA Request Area was a part of Grassy Narrows’ Territory.
- (nn) In 2015, Grassy Narrows commenced a judicial review application challenging the denial of the IEA Request and included in the application materials served on Ontario and filed with the court, a map of the IEA Request Area, which corresponds with Appendix “A” herein.
- (oo) In 2017, the Ontario Minister of Natural Resources and Forestry committed that no industrial logging would occur on the IEA Request Area during the 2012-2022 FMP unless agreed to by Grassy Narrows. The Whiskey Jack 2012-2022 FMP was amended in 2017 to include a map of the IEA Request Area or subject area and to operationalize Ontario’s commitment that the area would not be subject to industrial logging. The judicial review has since been held in abeyance.

- (pp) In September 2018, Grassy Narrows wrote to Ontario regarding Grassy Narrows' 2007 moratorium on industrial activity and to seek a meeting with the Ministry responsible for land use designations to resolve land use issues between Grassy Narrows and Ontario.
- (qq) Following the enactment of the Land Declaration in October 2018, Grassy Narrows sent numerous communications to Ontario regarding the Land Declaration and the IPCA. Grassy Narrows also invited Ontario to come to a table with Grassy Narrows to seek to resolve land use issues and to harmonize Grassy Narrows and Ontario laws on land use. The Land Declaration was widely reported on in the news media, including in the Toronto Star and CBC.
- (rr) As of October 2018, Ontario was in possession of the Land Declaration.
- (ss) Grassy Narrows made a map of the part of the Territory that comprised the IPCA. The IPCA map was shared with Ontario.
- (tt) The IPCA boundaries mirror the IEA Request Area boundaries exactly. The IPCA and IEA Request Area geography make up the Appendix "A" subject area.
- (uu) In a letter dated December 20, 2019, Grassy Narrows invited Ontario to meet with Grassy Narrows and Canada regarding the IPCA and proposed steps to be taken to formally establish the IPCA that would protect and conserve the subject area. Canada agreed to participate in meetings. Ontario sent an observer to one meeting but refused to come to the table with Grassy Narrows on land use issues.

- (vv) In its February 26, 2020 letter to Ontario's Minister of Energy, Northern Development and Mines (now the Minister of Northern Development, Mines, Natural Resources and Forestry, the "Minister"), Grassy Narrows called on Ontario to respect Grassy Narrows' 2007 moratorium on industrial activity on the subject area; expressed its deep concern about the rapid increase in mining claims and leases in the subject area; reiterated that mining activities were unwelcome in the subject area; requested the withdrawal of mining activities from the subject area; and enclosed the IPCA map of the subject area.
- (ww) On October 1, 2020, and November 13, 2020, Grassy Narrows sent letters in follow-up, reiterating the requests, and enclosing the previous correspondence.
- (xx) Ontario did not respond substantively to the letters and has yet to agree to come to the table with Grassy Narrows to seek to resolve outstanding land use issues including issues with respect to mining in the subject area.

Ontario Issues Permits that Cover Portions of Subject Area without Consulting Grassy Narrows

Applications for the Permits

- (yy) The Ministry received the applications for the Permits dated as follows (italicized):
 - (i) PR-18-000162 – *August 8, 2018*;
 - (ii) PR-19-000061 – *March 27, 2019*;
 - (iii) PR-19-000232 – *August 27, 2019*;
 - (iv) PR-19-000302 – *November 20, 2019*;

- (v) PR-19-000322 – *December 5, 2019*;
 - (vi) PR-20-000040 – *February 1, 2020*;
 - (vii) PR-20-000102 – *March 31, 2020*;
 - (viii) PR-20-000219 – *July 6, 2020*; and
 - (ix) PR-20-000357 – *December 10, 2020*.
- (zz) Ontario received all applications, *inter alia*:
- (i) after Ontario was in possession of Justice Feldman’s Stay Order map of 2011 and had withdrawn from mining the portion of the subject area now overlapped by the Permits;
 - (ii) after Ontario was in possession of the map illustrating the January 2014 IEA Request Area which is the subject area of the Territory;
 - (iii) after Ontario had agreed in 2017 that no logging would occur on the subject area during the 2012-2022 FMP; and
 - (iv) during the 2018 to 2020 period when Grassy Narrows sent correspondences to Ontario regarding the moratorium, Land Declaration, the IPCA, the need for Ontario to respect Grassy Narrows’ position that no resource extraction, including mining, can occur on the subject area, and Grassy Narrows’ invitation to Ontario to come to the table to seek to resolve land use issues with respect to the subject area.

(aaa) The applications for the Permits included the following types of early exploration activities:

- (i) Mechanized drilling of holes underground for the purpose of obtaining rock or mineral samples using machines above the prescribed threshold;
- (ii) Mechanized surface stripping which involves the use of heavy equipment to remove all vegetation and soil from areas of rock covering an area greater than the prescribed threshold;
- (iii) Pitting and trenching of bedrock covering an area greater than the prescribed threshold; and
- (iv) Line cutting on mining claims in excess of the prescribed threshold.

These activities are all prescribed at Schedule 3 of the Regulation as early exploration activities that require an exploration permit for the purposes of section 78.3 of the Act.

(bbb) The applications for the Permits pertained to geography that overlap with the subject area (see the map and table at Appendix “B”).

(ccc) Between September 2019 and February 2021, the Director decided to issue the Permits. The Permits were issued on the following dates (*italicized*):

- (i) PR-19-000061 – *September 9, 2019* (expiry May 28, 2022);
- (ii) PR-19-000232 – *November 25, 2019* (expiry November 20, 2022);

- (iii) PR-18-000162 – *November 26, 2019* (expiry November 13, 2021);
 - (iv) PR-19-000322 – *February 10, 2020* (expiry January 16, 2023);
 - (v) PR-19-000302 – *February 11, 2020* (expiry January 5, 2023);
 - (vi) PR-20-000102 – *May 29, 2020* (expiry May 19, 2023);
 - (vii) PR-20-000040 – *August 11, 2020* (expiry August 10, 2023);
 - (viii) PR-20-000219 – *August 21, 2020* (expiry August 20, 2023); and
 - (ix) PR-20-000357 – *February 3, 2021* (expiry February 2, 2024).
- (ddd) Ontario took no steps to consult with Grassy Narrows on the Permits. Ontario did not notify Grassy Narrows of the applications for the Permits, nor the Director's decisions to issue the Permits.
- (eee) At all material times leading up to and at the time of the issuance of the Permits, Grassy Narrows was wholly unaware that Ontario was considering applications for the Permits which, if issued (as they were), would allow for early exploration mining activities to occur on the subject area.

Grassy Narrows Becomes Aware of Permits and Contacts Ministry

- (fff) Grassy Narrows learned of the existence of the Permits in May 2021.
- (ggg) On May 26, 2021, June 9, 2021, and June 24, 2021, Grassy Narrows requested information from Ontario regarding the Permits.

- (hhh) On June 25, 2021, Ontario provided a response and enclosed the Permit circulation packages and a map. The response indicated that Ontario did not consult Grassy Narrows on the Permits because the Permits allow for mining activities outside of the boundaries in the 1980s TLUA Map.
- (iii) The enclosed map was created by Ontario in or around 2015 and includes the boundaries in the 1980s TLUA Map as well as the boundaries of the IEA Request Area (synonymous with the subject area).
- (jjj) Grassy Narrows' subsequent demands of Ontario to rescind the Permits have not been met with a positive response and the Permits remain in force.

Legal Grounds for the Application

- (kkk) Ontario was required pursuant to its constitutional obligations flowing from s 35 of the *Constitutional Act, 1982* and its statutory and regulatory obligations under the Act and Regulation to consult Grassy Narrows on the Permits.
- (lll) Ontario failed to consult Grassy Narrows. Ontario's failure constitutes a breach of the duty to consult and honour of the Crown. Accordingly, the Permits are unlawful and should be quashed.
- (mmm) Ontario's constitutional duty to consult Grassy Narrows is triggered when Ontario has real or constructive knowledge of Grassy Narrows' Aboriginal and treaty rights and contemplates conduct that might adversely impact those rights. Ontario is responsible for determining when the duty to consult is triggered and the scope of

the duty to consult by assessing the nature of the rights at issue and the seriousness of the contemplated conduct's potential adverse impacts on the rights.

(nmn) Ontario's duty to consult was triggered with respect to the Permits because, *inter alia*:

- (i) Ontario had and has real knowledge of Grassy Narrows' established Treaty 3 rights which are protected by s 35 of the *Constitution Act, 1982*;
- (ii) Ontario had and has real or constructive knowledge of Grassy Narrows' Indigenous rights and interests as prescribed in Grassy Narrows' Land Declaration;
- (iii) Ontario had and has real or constructive knowledge of Grassy Narrows' subject area over which Grassy Narrows people exercise their Aboriginal and treaty rights and inherent Indigenous rights;
- (iv) Ontario had and has real or constructive knowledge that the applications for the Permits proposed early exploration activities on lands that overlap with the subject area;
- (v) Early mining exploration activities which require an exploration permit trigger the duty as set out in the Act and the Regulation; and
- (vi) Early mining exploration activities are, by their very nature, inherently intrusive industrial activities that result in site clearing, vegetation and soil removal, erosion and sedimentation, use and discharge of surface water, alteration or loss of wildlife habitat, disturbance of wildlife species, and other impacts on natural heritage features and functions, and therefore have the potential to adversely affect the environment and Grassy Narrows people's treaty rights, health, way of life, and livelihood.

(ooo) Even though Ontario's constitutional duty to consult Grassy Narrows was triggered upon the Director considering the applications for the Permits, Ontario did not take any steps to consult Grassy Narrows.

(ppp) Ontario failed to:

- (i) Identify Grassy Narrows as an Aboriginal community that ought to receive notice of the applications for the Permits (per ss 14(1) of the Regulation);

- (ii) Provide notice to Grassy Narrows by sending copies of the applications for the Permits (per ss 14(1) of the Regulation);
- (iii) Provide Grassy Narrows with information supporting Ontario's *prima facie* assessment and position on the level of consultation required on the applications for the Permits;
- (iv) Allow Grassy Narrows the opportunity to respond in writing to the applications for the Permits (per ss 14(2) of the Regulation);
- (v) Allow Grassy Narrows the opportunity to meet and respond orally to the applications for the Permits and the *prima facie* assessment information with respect to the necessary level of consultation and the adverse impacts the mining activities contemplated in the applications for the Permits would have on Grassy Narrows' rights and interests;
- (vi) Consider and respond to Grassy Narrows' written and oral communications with respect to the applications for the Permits (which would have been provided had Grassy Narrows been provided the opportunity) before making any decision on whether to issue the Permits, including taking steps such as requiring the proponent to consult with Grassy Narrows and provide a consultation report (per ss 14(2) and 14(3) of the Regulation);
- (vii) Provide Grassy Narrows with capacity funding for its reasonable costs of engaging in consultation on the Permits, including capacity funding to, *inter alia*, review the applications for the Permits and associated documentation; obtain advice from subject matter experts, legal advisors, Elders, land users and traditional knowledge keepers; conduct an Indigenous Environmental Assessment; and support the costs of staff, advisors, and leadership in engaging with the Ministry, the proponent, and the community at large on the Permits;
- (viii) Respect Grassy Narrows' positions put forward in its correspondence that no mining activity, nor consultation on mining activity, proceed during the ongoing mercury crisis and during the COVID-19 pandemic;
- (ix) Conduct or require an Environmental Assessment that includes a robust cumulative impacts analysis which identifies, evaluates, and prevents the combined or additive impacts of mercury dumping, hydro damming, clearcut logging, mining exploration and climate change on the subject area, Grassy Narrows' Treaty rights, and Grassy Narrows people's health, environment, way of life, and livelihood, before authorizing mining activities on the subject area which risk further impacts;
- (x) Respect Grassy Narrows' established treaty rights, Indigenous rights and Land Declaration and decline to issue the Permits unless Grassy Narrows provides its free, prior, and informed consent.

- (qqq) If Ontario had satisfactorily performed its constitutional obligations and acted pursuant to its own statutory and regulatory scheme under the Act, the level of consultation that would have been owing would have been at the high end of the spectrum and required Grassy Narrows' consent given the established rights at stake, Grassy Narrows' Land Declaration, and the serious cumulative impacts of industry and resource extraction which have already occurred on the subject area and impacted the environment and Grassy Narrows people's health and ability to exercise their rights in highly detrimental ways.
- (rrr) If Ontario had acted honourably and consulted Grassy Narrows on the Permits, Ontario would have been obliged to acknowledge, respect, and act in a way that is responsive to Grassy Narrows' Indigenous perspective and Indigenous laws and protocols, such as the Land Declaration. Ontario failed to meet such obligations and breached Grassy Narrows' Land Declaration by issuing the Permits which allow for early exploration mining activities on the subject area.
- (sss) In the 2018 to 2020 period, Grassy Narrows sent numerous correspondences to Ontario with respect to the need for Ontario to, *inter alia*, protect and conserve the subject area, withdraw mining activities from the subject area, come to the table to resolve land use issues on the subject area, and harmonize Ontario law with the Land Declaration with respect to the subject area. Ontario did not substantively respond to the correspondences and proceeded to authorize further mining activity on the subject area without consulting Grassy Narrows. This is dishonourable conduct.

- (ttt) Ontario ran roughshod over Grassy Narrows' constitutionally protected treaty rights and inherent Indigenous rights, issuing the Permits in breach of Ontario's own law as well as Grassy Narrows' law. Ontario's failure to respect and uphold its treaty obligations to Grassy Narrows, to act with honour in its dealings with Grassy Narrows and to further the reconciliatory purpose of section 35 of the *Constitution Act, 1982* must be rectified by this Court through the issuance of the relief requested in this Application

Statutory Provisions and Rules to Be Relied On

- (uuu) *Constitution Act, 1982*, being schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35;
- (vvv) *Mining Act*, RSO, c M. 14, ss 2, 78.3;
- (www) O. Reg 308/12: Exploration Plans and Exploration Permits;
- (xxx) *Crown Liability and Proceedings Act, 2019*, SO 2019, c 7, Sched 17, s 14;
- (yyy) *Judicial Review Procedure Act*, RSO 1990, c. J.1;
- (zzz) *Rules of Civil Procedure*, RRO 1990, Reg 194;
- (aaaa) *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14;
- (bbbb) *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/61/49 (2007); and

(cccc) *The Grassy Narrows Land Declaration, 2018*;

(dddd) *Environmental Assessment Act*, RSO 1990, c. E.18;

(eeee) Such further and other grounds as counsel may advise and this Honourable Court may permit.

3. The following documentary evidence will be used at the hearing of the application:

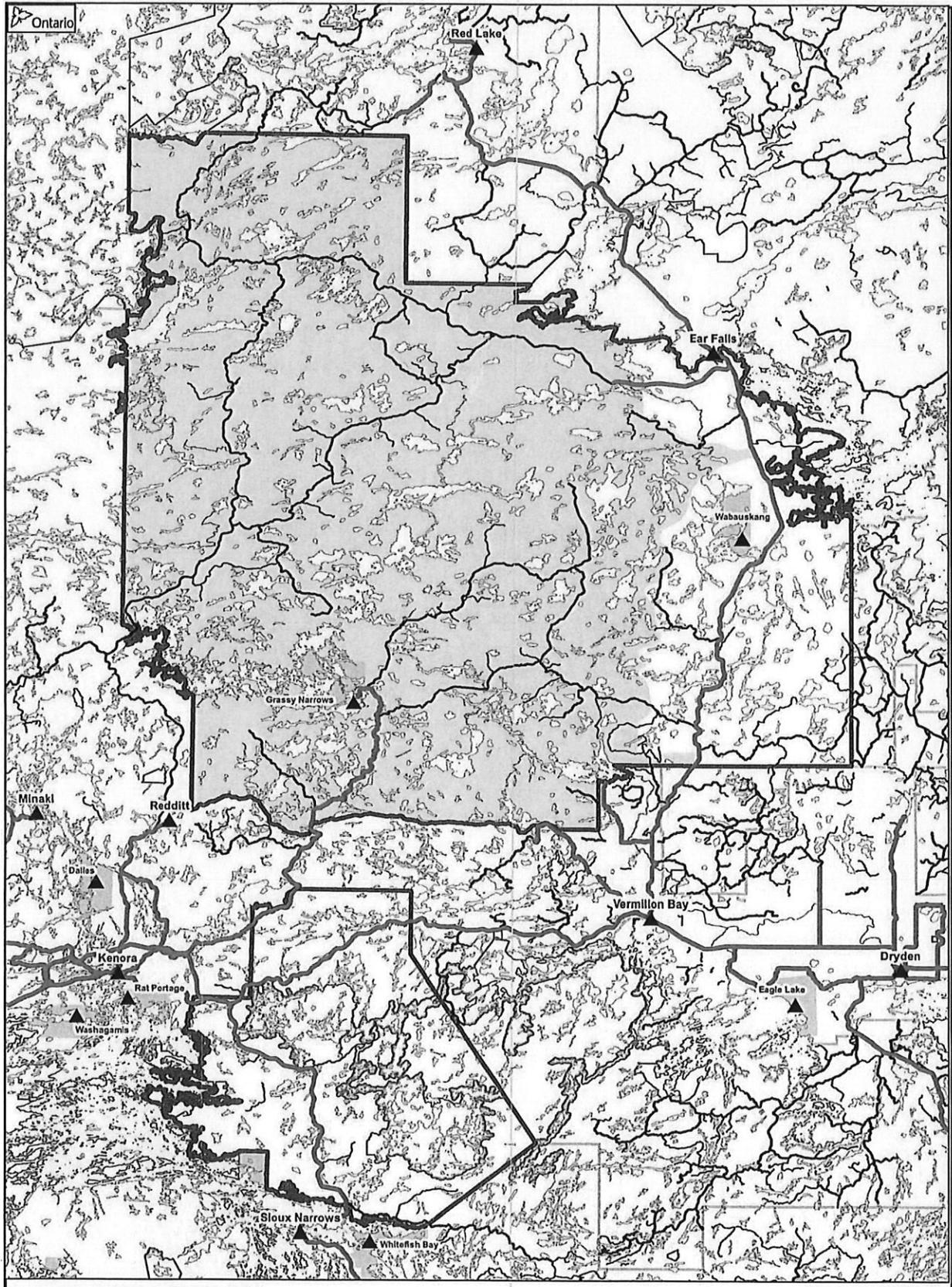
(a) Affidavits of Grassy Narrows community members to be sworn or affirmed;

(b) Records of Decision respecting the Permits; and

(c) Such further and other affidavits and evidence as the lawyers may advise and this Honourable Court may permit.

Appendix A: The Subject Area

Map 1: The Subject Area



Appendix B: Overlap of Permits with Subject Area

Map 2: The Overlap of the Geography of the Permits and Subject Area

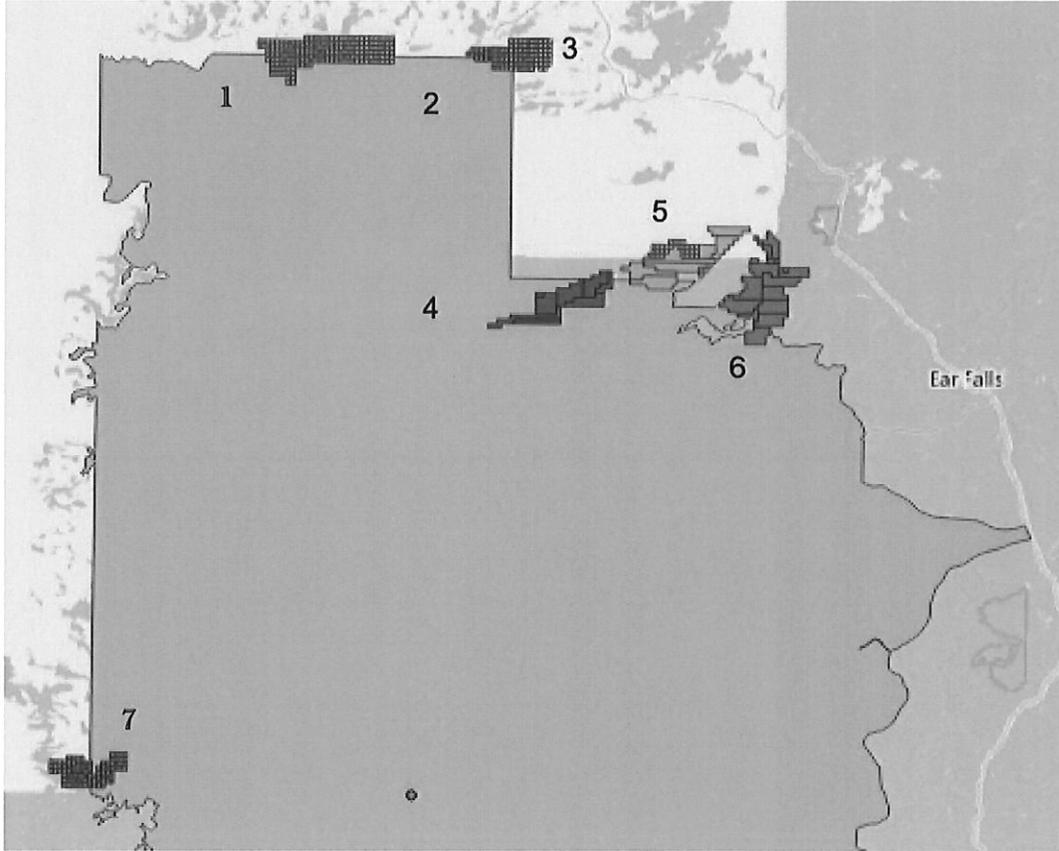


Table 1: Legend Area and Permit Number

Legend Area	Permit Number
1	PR-20-000040
2	PR-19-000322
3	PR-20-000102
4	PR-19-000061
5	PR-20-000357
5	PR-19-000232
5	PR-20-000219
6	PR-19-000302
7	PR-18-000162

November 15, 2021

CAVALLUZZO LLP
474 Bathurst Street, Suite 300
Toronto ON M5T 2S6

Lara Koerner-Yeo (LSO# 75765B)
LKoernerYeo@cavalluzzo.com

Tel: 416-964-1115

**CANADIAN ENVIRONMENTAL LAW
ASSOCIATION**

55 University Avenue, 15th Floor
Toronto, Ontario M5J 2H7

Joseph F. Castrilli (LSO #26123A)
castrillij@sympatico.ca

Richard D. Lindgren (LSO #28529E)
r.lindgren@sympatico.ca

Tel: 416-960-2284, ext. 7218 / 7214

Lawyers for the Applicant

Court File No.

GRASSY NARROWS FIRST NATION
Applicant

v.

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
Respondent

ONTARIO
DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

**NOTICE OF APPLICATION TO DIVISIONAL COURT
FOR JUDICIAL REVIEW**

CAVALLUZZO LLP

474 Bathurst street, Suite 300
Toronto, ON M5T 2S6

Lara Koerner-Yeo (LSO# 75765B)

Tel: 416-964-1115

LKoernerYeo@cavalluzzo.com

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

1500 – 55 University Avenue
Toronto, ON M5J2H7

Joseph F. Castrilli (LSO #26123A)

Richard D. Lindgren (LSO #28529E)

Tel: 416-960-2284, ext. 7214 / 7218
castrillij@sympatico.ca / r.lindgren@sympatico.ca

Lawyers for the Applicant